

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

DAVID CAIN, JR.,

Petitioner,

v.

05-CR-360-A

ORDER

UNITED STATES OF AMERICA,

Respondent.

Petitioner David Cain, Jr. moves to “supplement and/or amend” his § 2255 motion. The Court denied Petitioner’s § 2255 motion on October 15, 2015. See Docket No. 481. In addition, the Court denied Petitioner’s motion for a certificate of appealability (Docket No. 530), and the Second Circuit did so as well on December 14, 2017. See Second Circuit Docket 17-2095, No. 44.

Petitioner’s motion to amend cannot be construed as a “second or successive” § 2255 motion within the meaning of 28 U.S.C. § 2244, because the motion to amend was filed while “appellate proceedings following [the Court’s] dismissal of the initial petition remain pending.” *Whab v. United States*, 408 F.3d 116, 118 (2d Cir. 2005). In other words, Petitioner filed his motion to amend before the time expired for him to file a petition for a writ of *certiorari* concerning the Second Circuit’s denial of a certificate of appealability. See *Whab*, 408 F.3d at 120. See also *Clark v. United States*, 764 F.3d 653, 658 (6th Cir. 2014) (“A motion to amend is not a second or successive § 2255 motion when it is filed before the adjudication of the initial § 2255 motion is complete—*i.e.*, before the petitioner has lost on the merits and exhausted her appellate remedies.”)

However, because Petitioner has filed a notice of appeal from the Court's decision denying his § 2255 motion, the Court lacks jurisdiction to consider his motion to amend. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *Ching v. United States*, 298 F.3d 174, 180 n.5 (2d Cir. 2002) (Sotomayor, J.) (noting that district court "could not rule on any motion affecting an aspect of the case that was before the [Second Circuit], including a motion to amend [a § 2255] motion, while . . . appeal was pending"). Petitioner's motion to amend (Docket No. 546) is therefore denied for lack of jurisdiction.

SO ORDERED.

Dated: January 19, 2018
Buffalo, New York

s/Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE